

# Memorandum

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To : All Holders of Case Analysis Manuals

From : Department of Fair Employment & Housing  
Wanda Kirby *Wanda Kirby / tf*  
Deputy Director, Enforcement Division  
(213) 620-6067 (CALNET 8-640-2067)

Subject : Constructive Discharge Update

The purpose of this memorandum is to update the Constructive Discharge Chapter of the Case Analysis Manual by summarizing the major changes in constructive discharge law since December 26, 1990. One major change modifies the current Constructive Discharge Chapter and is noted as such below. In 1996, a revised Constructive Discharge Chapter will be issued, incorporating the information contained in this memorandum. File this cover memorandum in front of the Constructive Discharge Chapter's Table of Contents and read it in conjunction with the existing chapter.

This memorandum is divided into the following sections:

- I. STATUTORY CHANGES
- II. CHANGES IN REGULATIONS
- III. CASE LAW DEVELOPMENTS
- IV. CASE SUMMARIES
- V. INDEX OF CHANGES TO CASE ANALYSIS MANUAL

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## I. STATUTORY CHANGES

There have been no statutory changes which effect the Constructive Discharge Chapter.

## II. CHANGES IN REGULATIONS

There have been no regulatory changes which effect the Constructive Discharge Chapter.

### III. CASE LAW DEVELOPMENTS

- A. Constructive Discharge is Established If the Employee Was Subjected to Intolerable or Aggravated Working Conditions At the Time of Resignation And Such Conditions Were Either Intentionally Created or Knowingly Permitted by the Employer Such That a Reasonable Employer Would Realize That a Reasonable Person In The Employee's Position Would Be Compelled to Resign:

In 1994, the California Supreme court articulated, for the first time, the legal standard for constructive discharge cases. While all three elements are discussed below, special attention should be paid to the one element changed by the court in Turner v. Anheuser-Busch, Inc.<sup>1</sup>, (1994), 32 Cal.Rptr.2d 223, 230 [7 Cal.4th 1238, 1241]. In Turner, the court rejected the previous holdings of appellate courts that an employer need have only **constructive** knowledge of the employee's intolerable working conditions. Instead, the court requires that an employer have **actual** knowledge.

- 1) The Working Conditions Must Be Sufficiently Extraordinary and Egregious Such That a Reasonable Person under the Circumstances Would Find the Working Conditions So Intolerable or Aggravated as to Resign:

In Turner, the court stated that the employee may not be unreasonably sensitive to his or her working environment (p. 227). It concluded that there is an "outer limit" beyond which an employee cannot remain on the job after intolerable conditions arise and still claim constructive discharge (p. 232). In determining this "outer limit," the relevant question is what a reasonable employee would have done under the circumstances (p. 232). The length of time the employee remains on the job is only one of the relevant factors in analyzing the intolerability of the working conditions from the perspective of a reasonable person (p. 232).

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<sup>1</sup>In Turner, the plaintiff alleged constructive discharge in violation of fundamental public policy. The case was not brought under the FEHA. However, the analysis applied by the court in Turner is equally applicable to a constructive discharge claim brought under the FEHA.

Turner worked at defendant's Los Angeles brewery as an industrial relations manager for approximately six years, voluntarily left the company for a few years and returned to work for defendant at its wholesale operations division in 1984. In his December 28, 1988 evaluation, Turner received a "needs improvement" rating. He denied that his job performance had deteriorated and criticized the supervisor for not discussing the situation with him earlier. On January 3, 1989, he tendered a letter of resignation to defendant. Subsequently, Turner filed suit against defendant, alleging causes of action for age discrimination, constructive wrongful discharge in violation of public policy, breach of contract, and both intentional and negligent infliction of emotional distress. His age discrimination and emotional distress claims were dismissed prior to trial (pp.225-226).

In Turner, the Court rejected the plaintiff's constructive discharge claim because the plaintiff failed to prove the existence of intolerable or aggravated working conditions (p. 233). The court's finding was based on three factors: (1) the fact that Turner witnessed illegal conduct in the workplace, alone, did not create intolerable working conditions; (2) Turner's resignation more than four years after reporting alleged misconduct by fellow employees proved that his working conditions at the time of the alleged illegal activity were not so intolerable that a reasonable employee would have resigned; and (3) Turner's receipt of good performance reviews and raises more than three years after complaining of the illegal activity rebutted his claim that his employer was systematically harassing him because of his whistle-blowing activities (pp. 232-233).

2) **A Reasonable Employer Would Realize That a Reasonable Person In the Employee's Position Would Be Compelled to Resign Because of the Intolerable or Aggravated Working Conditions:**

The Commission has consistently applied the standard of a reasonable person in complainant's circumstances to its evaluation of the employer's knowledge of the employee's working conditions. (See DFEH v. The Customer Co., dba Zia's Food and Liquor (1991) FEHC Dec. No. 91-03, at p. 11; DFEH v. Madera County; Madera County Civil Service Commission; et al.: (1990) FEHC Dec. No. 90-03, at p. 31; DFEH v. Jack's Restaurant (1989) FEHC Dec. No. 89-13, at pp. 9-11; DFEH v. Del Mar Avionics (1985) FEHC Dec. No. 85-19, at p. 23; DFEH v. Xerox Corporation (1980) FEHC Dec. No. 80-26, at p. 11).

The Commission's and the court's use of a reasonable person in the employee's [complainant's] circumstances remains unchanged by Turner. It is unclear what is meant by the phrase reasonable employer used by the court in Turner. No court, prior to Turner, has held the employer to a reasonableness standard.

- 3) The Intolerable or Aggravated Working Conditions At the Time of the Employee's Resignation Must Have Been Either Intentionally Created or Knowingly Permitted by the Employer:

In Turner v. Anheuser-Busch, Inc. the California Supreme Court modified the employer's knowledge element for a constructive discharge claim. In order to prevail on a constructive discharge claim, it is now necessary to prove that the employer either **intentionally created** or **knowingly permitted** the intolerable working conditions. The requirement of actual knowledge is a departure from prior California appellate and Commission decisions.

The court stated that it is not enough for an employee to prove that the employer had constructive knowledge of the intolerable working conditions (p. 230). The employer, or those persons who effectively represent the employer, i.e., its officers, directors, managing agents, or supervisory employees, must have actual knowledge of or intent to create the intolerable working conditions (p. 230). Thus, the "employer must either deliberately create the intolerable working conditions that trigger the resignation or, at the minimum, must know about them and fail to remedy the situation in order to force the employee to resign" (p. 229).

Where the employer lacks actual knowledge of the working conditions, the employee must notify someone in a position of authority of his or her situation (p. 230). Notification, according to the court, allows the employer to correct a potentially destructive situation and prevents employers from shielding themselves by deliberately ignoring a situation that has become intolerable to a reasonable employee (p. 230).

a) Prior Law

The Commission has required that three elements be established before finding that the employee was constructively discharged:  
(1) the employer took discriminatory action against the

complainant; (2) the complainant resigned because the employer's discriminatory action made working conditions intolerable, and (3) the employer **either knew or should have known** that its actions would result in resignation. (See DFEH v. The Customer Co., dba Zia's Food and Liquor (1991) FEHC Dec. No. 91-03, at p. 11; DFEH v. Madera County; Madera County Civil Service Commission; et al.: (1990) FEHC Dec. No. 90-03, at p. 31; DFEH v. Jack's Restaurant (1989) FEHC Dec. No. 89-13, at pp. 9-11; DFEH v. Del Mar Avionics (1985) FEHC Dec. No. 85-19, at p. 23; DFEH v. Xerox Corporation (1980) FEHC Dec. No. 80-26, at p. 11). As a result of Turner, the complainant must now show that the employer had actual knowledge that the intolerable working conditions would lead to resignation.

Prior to Turner v. Anheuser-Busch, Inc., California courts allowed a claim for wrongful constructive discharge on a finding that the employer had only constructive knowledge of the intolerable working conditions leading to an employee's resignation (Brady v. Elixir Industries (1987) 196 Cal.App.3d 1299, 1306 [242 Cal.Rptr. 324]).

b) Effect on Current Version of Case Analysis Manual:

Sections affected include the discussion of the legal standard at p. 3, the discussion of "should have known" at p. 5, the discussion of Analytical Outline 1 at p. 7, and the discussion of whether the employer should have known a resignation would result at pp. 12-13.

B. Conclusion

Since the California Supreme Court changed the required elements for a constructive discharge in 1994, there have been no Commission decisions that have addressed constructive discharge. Although the Commission has always allowed proof of an employer's constructive knowledge as evidence of the employer's knowledge of the working conditions, the Commission follows California Supreme Court precedent. Thus, in order to successfully plead a constructive discharge allegation in both the administrative forum and in state court, complainants should meet the new requirements established by the court in Turner v. Anheuser-Busch, Inc.

#### IV. CASE SUMMARIES

##### A. Fair Employment and Housing Commission Decisions

DFEH v. The Customer Co., dba Zia's Food and Liquor (Bolger) (1991)  
FEHC Dec. No. 91-03.

(please refer to **Sexual Harassment Chapter Memo**)

##### B. California Supreme Court Decisions

Turner v. Anheuser-Busch, Inc. (1994), 32 Cal.Rptr.2d 223, 230 [7 Cal.4th 1238, 1241]. Employee resigned his job and sued for constructive discharge in violation of public policy and breach of contract alleging he was forced to quit because of being subjected to intolerable working conditions after complaining about alleged illegal conduct. The court concluded that there was no constructive discharge or breach of contract. It held that plaintiff must show that employer had either actual knowledge of the intolerable or aggravated conditions or had itself created those conditions. An employer's constructive knowledge of the intolerable or aggravated conditions is insufficient for a constructive discharge allegation.

##### C. California Appellate Decisions

Gibson v. Aro Corporation (1995) 95 Daily Journal D.A.R. 3093. Age discrimination and constructive discharge ---- Court reversed jury's finding that plaintiff had been constructively discharged due to the fact that plaintiff had failed to notify his employer that he considered the working conditions to be intolerable.

Hunio v. Tishman Construction Corporation of California (1993) 18 Cal.Rptr.2d 253. Age ---- Employer found liable for harassment and constructive discharge because of plaintiff's age. The constructive discharge was based on a breach of an implied-in-fact employment contract, a breach of the implied covenant of good faith and fair dealing, and a violation of the FEHA. The court found that the existence of a continuous pattern of discriminatory treatment over a period of years created conditions so intolerable as to justify a reasonable employee's resignation. It affirmed the award of \$2.1 million in economic damages, \$2 million in emotional distress damages, and \$1 million in punitive damages.

Soules v. Cadam, Inc. (1991) 2 Cal.App.4th 390 [3 Cal.Rptr.2d 6]. Plaintiff claimed wrongful constructive discharge based on a breach of an implied-in-fact employment contract. The court held that demotion of job level, even when accompanied by reduction in pay, does not constitute constructive discharge. Court granted employer's motion for summary judgment.

Valdez v. City of Los Angeles (1991) 231 Cal.App.3d 1043 [282 Cal.Rptr. 726]. Court concluded that former police officer was constructively discharged due to discrimination against Hispanic officers in violation of the FEHA. The court applied the standard of a reasonable person in the employee's position. It held that a plaintiff must prove the existence of aggravating factors by showing a continuous pattern of discrimination. In general, a single isolated instance of employment discrimination is insufficient to support a finding of constructive discharge. The court applied rules established in Title VII constructive discharge decisions.

Brady v. Elixir Industries (1987) 196 Cal.App.3d 1299, 1306 [242 Cal.Rptr. 324]. Sex (female) discrimination and tortious constructive discharge. Court held that in order to establish constructive discharge, it is necessary to show that the employer had actual or constructive knowledge of the intolerable conditions and of their impact on the employee.

V. INDEX TO CASE ANALYSIS MANUAL CHANGES

Case Analysis Manual Sections  
Changed By This Update

Section Changes Contained  
In This Memo

Page 3 - A.2. Legal Standard

III. CASE LAW DEVELOPMENTS, A.

Page 5 - 3.c. Constructive Knowledge

III. CASE LAW DEVELOPMENTS, A.

Page 7 - B.3. Analytical Outline 1

III. CASE LAW DEVELOPMENTS, A.

Page 12 - 3.c. Explanation of  
Analytical Outline 1

III. CASE LAW DEVELOPMENTS, A.

Page 13 - 3.c. Explanation of  
Analytical Outline 1

III. CASE LAW DEVELOPMENTS, A.